

1                                   **IN THE UNITED STATES DISTRICT COURT**  
2                                   **FOR THE DISTRICT OF PUERTO RICO**

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5       **VICTOR ANDINO, et al.,**

6                   **Plaintiffs,**

7                   **v.**

8       **MUNICIPALITY OF CATAÑO, et al.,**

9                   **Defendants.**

**Civil No. 11-1715 (GAG)**

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13                                   **OPINION AND ORDER**

14               Plaintiffs move for reconsideration (Docket No. 71) of the court's opinion and order granting  
15 defendant's motion for summary judgment (Docket No. 70).

16       **I.       Standard of Review**

17               A motion for reconsideration may not serve as a vehicle to relitigate matters previously  
18 litigated and decided by the court. Villanueva-Mendez v. Vazquez, 360 F. Supp. 2d 320, 322  
19 (D.P.R. 2005). Courts entertain motions for reconsideration that seek to correct manifest errors of  
20 law or fact, present newly discovered evidence, or arise due to intervening changes in law. See  
21 Rivera Surillo & Co. v. Falconer Glass. Indus. Inc., 37 F.3d 25, 29 (1st Cir. 1994) (citing FDIC v.  
22 World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992)); Cherena v. Coors Brewing Co., 20 F. Supp. 2d  
23 282, 286 (D.P.R. 1998)). A losing party may not "repeat old arguments previously considered and  
24 rejected, or . . . raise new legal theories that should have been raised earlier." Nat'l Metal Finishing  
25 Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990).

26       **II.       Discussion**

27               Plaintiffs state the court granted summary judgment because Defendants provided a  
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1 legitimate, non-discriminatory reason for Andino's termination, specifically, two separate incidents  
2 of insubordination. (Docket No. 71 at 1-2.) The court did not grant summary judgment merely  
3 because Defendants presented what the court deems a legitimate, non-discriminatory reason for  
4 termination. This determination is the second step of Title VII analysis for claims rooted in indirect  
5 evidence. (See Docket No. 70 at 4.) Plaintiffs cite Che v. Massachusetts Bay Transp. Auth., 342  
6 F.3d 31, 39-40 (1st Cir. 2003), for the proposition that "using insubordination as a basis for  
7 dismissal could be considered pretext by a jury where there was testimony from which it could be  
8 inferred that the supervisor withdrew the order because the conduct had been permitted in the past."  
9 (Docket No. 71 at 2.) Plaintiff elaborates, "The First Circuit reasoned that one 'way of  
10 demonstrating pretext is by showing that the employer's proffered'" explanation is unworthy of  
11 credence. (Id.)

12 Plaintiffs attempt to fit into this mold Andino's and his co-worker's sworn statements.  
13 Specifically, Plaintiffs claim that finding him insubordinate was unjustified because "the  
14 rehabilitation center in Ponce where the Mayor's executive assistant ordered Mr. Andino to take the  
15 patient closed at 3:00 p.m. every day, so it made no sense for Mr. Andino to drive two hours to  
16 Ponce only to be sent back to Cataño." Plaintiffs argue this testimony "undermines [D]efendants'  
17 contention that their only intent was to sanction Mr. Andino." (Docket No. 71 at 2.) Plaintiffs  
18 contend this offends Che's directive that "determinations of motive and intent, particularly in  
19 discrimination cases, are questions better suited for the jury, as proof is generally based on inferences  
20 that must be drawn, rather than on the proverbial 'smoking gun.'" (Id. at 3 (quoting 342 F.3d at 40).)  
21 Plaintiff supports this argument by citing Acevedo-Parillo v. Novartis Ex-Lax, Inc. to substantiate  
22 that "a false reason for dismissal is evidence, sometimes quite good evidence, that the reason for the  
23 dismissal was" discriminatory. (Id. at 3 (citing 696 F.3d 128, 141 (1st Cir. 2012)).)

24 Regarding the insubordination findings, however, the court disagrees with Plaintiffs'  
25 contention that "Mr. Andino's lay response to counsel's requests that he point to a smoking gun are  
26 merely the lay expressions of a recognized legal tenet that smoking gun evidence is rarely available  
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1 in discrimination cases.” (Docket No. 71 at 3.) Defendants’ counsel asked, “Is it your contention  
 2 that Mayor Rosario has discriminated against you because of your race in any way,” to which  
 3 Andino replied, “No, I can’t say that.” (Docket No. 52-4 at 41, ¶¶ 10-13.) Furthermore, counsel  
 4 asked, “So you don’t contend – it’s not your contention that you were suspended because of your  
 5 race?” Plaintiff replied, “I don’t think so. Maybe they have it in their head, but I don’t think so.”  
 6 (*Id.* at 39, ¶¶ 22-25; 40, ¶ 1.) This statement is clear: Mr. Andino stated that his supervisors may  
 7 have suspended him because of his race, but he does not think so. This testimony discredits  
 8 Plaintiffs’ allegation that the first infraction was pretextual.

9 Furthermore, Plaintiffs cannot demonstrate that the true reason behind Andino’s termination  
 10 was discriminatory. Plaintiffs state, “This Court also discounts the statement by Jesus Diaz, Mr.  
 11 Andino’s supervisor, that Mr. Andino just had to be black when Mr. Andino complained that Mr.  
 12 Diaz had reduced his vacation for matters that should have been attributed to sick leave.” (Docket  
 13 No. 71 at 3.) Plaintiffs contend, “The implication was that there was some [sic] improper in a black  
 14 man, Mr. Andino, asserting his rights as an employee, that perhaps Mr. Andino was acting  
 15 presumptuous, or even above his station.” (*Id.*) The court did not discount Defendant Diaz’s  
 16 statement. Rather, it squarely considered it, as Plaintiffs’ citation of Hazard-Chaney, the First  
 17 Circuit case upon which the court relied, clearly reveals. (*Id.*) Plaintiffs claim that the Hazard-  
 18 Chaney court “affirmed the District Court’s rejection of [a supervisor’s consistent reference to  
 19 appellant as ‘black’ or ‘African American’] that was inadmissible hearsay to prove racial  
 20 discrimination.” (*Id.* at 3-4.) Plaintiffs’ contention falters, however, because the Hazard-Chaney  
 21 court grappled with the ostensibly inadmissible statement as though it was admissible. (“In the face  
 22 of a downward progression . . . the [decision-maker’s]<sup>1</sup> isolated, unsubstantiated remark - were it to

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 25 <sup>1</sup> In Hazard-Chaney, the “only evidence with racial content was a statement reported by  
 26 appellant from an Optima recruiter that” Dr. Keith Lammers, “appellant’s supervisor,” consistently  
 27 “referred to [appellant] as Afro - ‘African-American’ or ‘black,’ in any of the management meetings,  
 28 reminding people that” there exists a “low expectation as to productivity” for African Americans.  
 56 Fed. Appx. 521, 522 (1st Cir. 2003).

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1 be considered as non-hearsay, and even when combined with the several racially neutral incidents  
2 she cites - is insufficient to invigorate her claim of pretext.”) (emphasis added).

3 Plaintiffs elected not to pursue wrongful termination or other employment-based claims in  
4 this litigation, focusing only on raced-based discrimination under Title VII and Section 1981.  
5 Perhaps there exist valid claims elsewhere, but the court affirms its judgment as to the laws  
6 Plaintiffs claim Defendants offended.

7 **III. Conclusion**

8 For the abovementioned reasons, the court **DENIES** Plaintiffs’ motion to reconsider.  
9 (Docket No. 71.)

10  
11 **SO ORDERED.**

12 In San Juan, Puerto Rico this 12th day of December 2012.

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14 /S/ Gustavo A. Gelpí  
15 GUSTAVO A. GELPI  
16 United States District Judge  
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